IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 223 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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JAYSHREEBEN VASANTKUMAR VITHLANI - Applicant(s)
Versus
MANJIBHAI & CO. & 1 - Opponent(s)

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Appearance :
MR MEHUL S SHAH for Applicant(s) : 1, 1.2.1, 1.2.2,1.2.3 MR SURESH M SHAH for Applicant(s) : 1, 1.2.1, 1.2.2,1.2.3
None for Opponent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 11/10/2006

ORAL JUDGMENT

1. This application has been moved by the heirs of the original defendant of Regular Civil Suit No. 221 of 1982 under

the provisions of Section 29(2) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (the Act) challenging the judgment and order dated 11.07.2006 made by the Appellate Court in Regular Civil Appeal No. 10 of 1994 whereby the judgment and decree made by the trial Court on 30.12.1993 in Regular Civil Suit No. 221 of 1982 came to be confirmed.

2. The facts are that the plaintiff had let-out the suit premises to the original defendant late Shri Vasantkumar Khimjibhai Vithalani for monthly rent of Rs. 150/- (Rupees One Hundred and Fifty only). The suit premises are situated at Yagnik Road, Rajkot and comprise of one shop which had been hired by the defendant for carrying on medical practice as a bone-setter in Ayurvedic system. The defendant was also working as a Physiotherapist. According to the plaintiff by virtue of the provisions Section 13 (1) (k) of the Act as the suit premises had not been used for the purpose for which the suit premises had been let-out and the non-user was for a continuous period of six months immediately preceding the date of the suit the plaintiff was entitled to decree of eviction against the defendant – tenant. The trial Court vide its impugned judgment dated 30.12.1993 accepted the case put

up by the plaintiff and decreed the suit in favour of the plaintiff. This came to be challenged by the defendant through his legal heirs, the defendant having passed away during the pendency of the proceedings. The Appeal came to be dismissed vide impugned judgment dated 11.07.2006 which is under challenge.

3. Mr. S. M. Shah, learned Advocate for the defendant has assailed the order of the Appellate Court principally on two grounds : (1) that admittedly the judgment and decree were made by the trial Court in absence of the Advocate of the defendant, which is a matter of record, and the Appellate Court erred in not granting the prayer of remand made by the appellants in the appeal. That a party should not be penalized for the absence of the Advocate. He has placed reliance on the decision of the Apex Court in the case of **Rafiq v/s. Munshilal** reported in **AIR 1981 SC 1400** in this regard. (2) The order of the Appellate Court was not an order in the eye of law as the same suffers from non-fulfillment of the pre-requisite conditions stipulated by the provisions of Order XLI Rule 31(a) of the Civil Procedure Code. That the Appellate Court having failed to set out points for determination the entire order was vitiated in law and only on this count the

same was required to be quashed and set aside relegating the parties to the Appellate Court in the first instance. In support of this proposition he has placed reliance on the following decisions :

a). Unreported decision in Civil Revision Application No. 1287 of 1983 dated 18.09.2002 in the case of Vasantrao Vinayakrao Khopker v/s. Indumatiben Ramchandra Pradhan.

b). The order of admission in Second Appeal No. 53 of 2003 dated 12.10.2004 in the case of Patel Virji Kanji v/s. Patel Velji Alias Shivji Hirji.

c). Case of Ismail Haji Mohammed Abrahani v/s. The State of Bombay reported in 1966 (7) GLR 208.

d). Case of Madhukar v/s. Sangram reported in AIR 2001 SC 2171 and

e). Case of Smt. Anita M. Hareeto v/s. Abdul Wahid Sanaullah reported in AIR 1985 Bombay 98.

4. He has also fairly invited attention to the decision

in the case of **Navinchandra Nathalal Doshi v/s. Jagdishbhai Shankerlal Modi** reported in **2004 (2) GLR 1714** to point out that this Court has also taken a view that where the entire case has proceeded on the points at issue between the parties merely non-framing of points for determination itself cannot vitiate the judgment of the Appellate Court.

5. Insofar as the first contention is concerned viz. absence of the Advocate it is necessary to take note of the fact that the trial Court has recorded in Paragraph Nos. 15 to 18 as under :

> *“15. In this suit, the defendant has not cross-examined the witnesses of the plaintiff side or the defendant has not led any evidence of his side, only the plaintiff side has adduced the oral as well as the documentary evidence. The defendant side didn't remain present to cross-examine the witnesses of the plaintiff side, and therefore, the right of the defendant to cross examine the witness of the plaintiff side was closed. Thereafter, the defendant applied to grant his permission to cross examine the witness of the plaintiff side. The permission was granted to the defendant side to cross examine the witness of the plaintiff side on payment of cost to the other side. The defendant didn't pay the cost as ordered to the other side and therefore, the defendant could not exercise his right to cross examine the witness of the plaintiff side based on permission. The suit was kept for judgment and before the judgment is pronounced, the learned Advocate Shri S.P. Khokhani for the defendant side applied by application at Exh. 119*

and urged that he wants to argue out on very important aspect and therefore, he should be heard. Therefore, the defendant was given an opportunity to adduce his submission before the judgment is pronounced. In the application at Exh. 119, the defendant has stated that the plaintiff firm is a partnership firm and it is not registered one and no require evidence in that regard is not brought on record and therefore, the suit of the plaintiff is liable to be dismissed on this point. The application further states that the issue on this point is raised.

16) On this application, the learned Advocate Shri S.P. Khokhani was heard and he argued that Rule 2 of Order XIV of C.P.C. Provides for the issue to be heard as preliminary issue and in that provision the word "shall" is used and therefore, the issue on law should be heard as preliminary issue is mandatory. Learned Advocate Shri S.P.Khokhani further argued that though the suit may have been heard on all issues, the court can split up the preliminary issue and other issues for deciding the matter and the court can declare its decision first on preliminary issue and thereafter if it becomes necessary to give decision on other issues it can declare its decision on other issues.

17) Learned Advocate Shri S.P.Khokhani further argued that the plaintiff has failed to establish that the plaintiff firm was registered on the date of the suit and therefore, this suit is not maintainable.

18) Against this argument, the learned Advocate Shri R.M.Tanna for the plaintiff argued that the plaintiff firm is registered and it was holding that capacity of registration on the date of the suit and the registration certificate produced by the plaintiff side is valid and effective even today, and therefore, the arguments advanced by the learned Advocate Shri S.P.Khokhani is not in consonance with record. He further argued that whole suit is over and the case is fixed for final judgment and so at present no question of deciding any issue as a preliminary issue can be considered. He further argued that deciding any issue as a preliminary

> *issue can be considered before the evidence on record begins. He further argued that only issue involving question of law can be heard as preliminary issue. He further argued that the issue which involves mis question of law and fact cannot be heard as a preliminary issue. He further argued that issue regarding the registration of the firm involves the mis question of law and fact and therefore, such as issue cannot be decided unless the evidence is recorded. Hence, he lastly argued that the submission of the learned Advocate Shri S.P. Khokhani is not tenable in law."*

Therefore, the absence of the Advocate, on the facts of the case, is by choice and not by reason of any inability as such. It is not the case where the Advocate for the defendant had altogether given up to appear in the matter. When the phrase "by choice" is used it is in the context of the fact that the learned Advocate opted to appear for certain part of the proceedings and absented himself during other part of the trial. It is not the case where the defendant was not represented at all. The trial Court even granted further opportunity on payment of costs. The opportunity was not availed of. In the circumstances, the ratio of the Apex Court decision on which reliance has been placed cannot be pressed into service in support of the case of the defendant. In the said case in Paragraph No.3 of the judgment the Apex Court has noted the contentions raised to the effect " that a practice has grown up in the High Court of Allahabad amongst the lawyers

that they remain absent when they do not like a particular Bench". There is a distinction between the proceedings at the level of High Court and before a trial Court. In the former a party can leave the entire conducting of the matter to the advocate engaged, but in the latter, where evidence is required to be led or traversed, a party cannot afford not to pursue the matter alongwith his advocate, because the facts and evidence are within the personal knowledge of the party.

6. In the present case Mr. S. M. Shah, learned Advocate on behalf of the defendant submitted that insofar as the learned Advocate who was appearing before the trial Court had become notorious for remaining absent and in light of such fact the client or the case should not suffer. Whether this was, or was not, it is not for this Court to state any thing in this regard. Suffice it to state that considering the period for which the parties have been litigating, as recorded by the Appellate Court, no case is made out for remand. The suit is of year 1982. It was decided by the trial Court in December 1993. The appeal is of 1994 and came to be decided in July 2006. May be the defendants may not be saddled with the blame for this state of affairs but at the same time it is necessary to take note of the fact that a valuable right has

come into existence insofar as the other side is concerned and for no fault of other side, just as the defendant cannot be penalized for no fault of his, the plaintiff also cannot be made to suffer a second innings for no fault of his. The party which is not vigilant cannot expect the Court to be indulgent. In the circumstance the first contention does not merit acceptance.

7. Insofar as the second contention which is based on provisions of Order XLI Rule 31 of Civil Procedure Code is concerned this Court is in complete agreement with the ratio laid down by this High Court in the case of Navinchandra Nathalal Doshi (supra), that the Appellate Court is required to frame the points for determination as required by clause (a) of Rule 31 of Order XLI of Civil Procedure Code; but the order of the Appellate Court has to be examined in light of the dispute between the parties, the approach of the parties i.e. in what manner they have understood and approached the matter by conducting the same before the Appellate Court, and finally the entire judgment of the Appellate Court to ascertain as to whether all the parties including litigants and the Appellate Court have approached the matter after taking into consideration the points which arise for determination. In the present case it is not as if the points have not been framed;

may be they have not been happily drafted. However, the only dispute between the parties was whether the conditions stipulated by the provisions of Section 13(1) (k) of the Act stand fulfilled. On reading of entire judgment it becomes apparent that the parties have addressed the Court on the said issue and the Court has dealt with the said issue.

8. In this regard, the legal position stated by the Apex Court in Bhaichand Amoluk & Co. v. Commissioner of Income Tax, Bombay City I, [1962] 42 ITR 511, is as under:

> "The order of the Tribunal must be read as a whole to determine whether every material fact, for and against the assessee, has been considered fairly and with due care; whether the evidence pro and con has been considered in reaching the final conclusion; and whether the conclusion reached by the Tribunal has been coloured by irrelevant consideration or matters of prejudice. It is not however necessary that the order of the Tribunal must be examined minutely, sentence by sentence, so as to discover a minor lapse here or an incautious opinion there to be used a peg on which to hang an issue of law. "

9. It is also necessary to state that in a case where the Appellate Court accepts and endorses the reasons and findings of the trial Court it is not necessary for the Appellate Court to undertake the entire exercise once again in detail. Suffice it to state that the impugned judgment must reflect

that the Appellate Court is aware of what were the points for determination, after framing them record the contentions of both sides in brief and lay down its reasons as to why the Appellate Court agrees with the trial Court, and / or disagrees with the views expressed by the trial Court. The Appellate Court cannot be expected to undertake a retrial in case where it endorses and accepts the reasons expressed by the trial Court.

10. The order of the Appellate Court may be examined in this regard. As already noticed hereinbefore the basic case of the plaintiff was that the defendant had not been using the suit premises for a continuous period exceeding six months immediately preceding the date of the suit. The plaintiff was only required to prove this condition stipulated by the provisions. As to whether the user was with reasonable cause or not had to be shown by the defendant.

11. Both the lower Courts have concurrently found that the plaintiff has proved his case. The defendant had categorically stated in the written statement that it was correct that the defendant had gone to Veraval to discharge duties as a Physiotherapist in the employment of Veraval

Municipality. However, it is the case of the defendant that he used to come once a week to Rajkot and used the suit premises. Thus, the defendants having pleaded existence of reasonable cause, it was for the defendants to establish the same by leading evidence in this regard. The trial Court has in this connection recorded thus :

> "27. The defendant has not come forward to establish his defence or to prove the fact that non-user by him of the suit premises was not without reasonable cause. It is specific allegation that the defendant is serving at Veraval if the defendant is serving at Veraval then the defendant would not be in a position to utilise the shop for the purpose for which it was let. Therefore, the say of the plaintiff requires to be accepted that more than six months prior to the date of the suit the defendant was not using the suit shop for the purpose for which it was let. In these circumstances, the say of the plaintiff side requires to be accepted and the defendant has not come forward to establish his defence in relation to the issue No.2. Hence, I decide that the plaintiff succeeds in proving issue No.1 accordingly issue No.1 is answered in the affirmative and issue No.2 is answered in the negative."

It is this finding which has been confirmed by the Appellate Court.

12. On a plain reading of the provisions of Section 13(1)(k) of the Act it is not possible to state that either the Appellate Court or the trial Court have committed any error in law. In face of concurrent findings of facts recorded by both

the Courts it is not possible to hold that any error as such has been committed which would require this Court to interfere. In the result the application does not merit acceptance on any of the grounds pleaded. The same is accordingly summarily rejected.

[D.A.MEHTA, J.]

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